IN THE SUPREME COURT OF VERMONT

SUPREME COURT DOCKET NO. 2002-564

IN RE: STANLEY and SUSAN POTTER,
Debtors

MORTGAGE LENDERS NETWORK, USA,
Defendant - Appellant

V.

JAN M. SENSENICH, TRUSTEE,
STANLEY and SUSAN POTTER,
Plaintiff - Appellees

MOTION FOR REARGUMENT UNDER V.R.A.P. 40

Jan M. Sensenich, Chapter 13 Trustee, Plaintiff - Appellee, pro se, and Stanley and Susan Potter, Appellees, by and through their attorney, Rebecca Rice, Esq. hereby move for reargument of this appeal pursuant to V.R.A.P. 40.

ARGUMENT

V.R.A.P. 40 provides for reargument of appeals where the moving party believes the Court has overlooked or misapprehended particular points of law or fact and that the correction of such would probably affect the result. Appellees respectfully urge that this Court has assumed a fact to be uncontested in this appeal, when in reality the fact was neither stipulated to, found by any of the lower courts to be true or argued to be true, and is in fact not true.

The primary pillar upon which this Court's reformulation of the Certified Question, as well as its ultimate decision, rests, is the stated fact that: "The superior court issued a judgment order and decree of foreclosure in favor of MLN, which MLN caused to be ***recorded*** on March 31, 2000". (emphasis supplied) ***Mortgage Lenders Network, USA v. Sensenich, et. al.,*** Supreme Court Docket No. 2002-564, Entry Order dated October 18 2004, p. 1, Paragraph 2. As is stated in all of the lower court opinions as well as the Opinion of the Second Circuit Court of Appeals, "The state court issued a Judgment Order and Decree of Foreclosure in favor of Mortgage Lenders [Network] on March 31, 2000." ***In re Stanley and Susan Potter, Sensenich v. Mortgage Lenders Network, USA***, A.P. No. 01-01031, Amended Memorandum of Decision Denying Defendant's Motion for Summary Judgment and Granting Plaintiffs' Cross-Motion for Summary Judgment, dated September 21, 2001, p. 2 (Bankr. D. Vt.) (copy attached as Appendix Item No. 2); See also: ***Mortgage Lenders Network, USA v. Sensenich, et. al.,*** Civil No. 1:01CV 335, Memorandum Decision (J. Garvan Murtha) dated January 22, 2002, at p. 2 (D. Vt 2002)(copy attached as Appendix Item No. 3) and ***Mortgage Lenders Network v. Sensenich, et. al.***, Docket No. 02-5016, Opinion and Order Certifying Question to the Vermont Supreme Court, dated December 11, 2002, at p. 3 (2nd Cir. 2002)(copy attached as Appendix Item No. 4). All three federal court decisions, in their recitation of the critical facts in this case, in almost identical language, recite that the state court ***issued*** the judgment order on March 31, 2000, ***not*** that MLN ***recorded*** the order in the land records as stated

in this Court's Entry Order. It should also be self-evident that if, as ***is*** undisputed, the superior court did not even issue the judgment order until March 31, 2000, it would be impossible for MLN to record a final judgment order on that date, since it would not be final until the appeal period would have run, at least ten days later.

In point of fact, the foreclosure judgment was ***never*** recorded in the land records, and even as of the date of this motion, is still not recorded in the land records. See Affidavit of Rebecca Rice, Esq., (attached as Appendix Item No. 1.) Accordingly, the fact that the judgment was never recorded in the land records is exactly why none of the parties or the three federal courts ruling on this case ever focused any significant attention on the judgment. It is simply not in the chain of title to this real estate, as *is* the foreclosure *complaint*. As it was never recorded, it could never give a subsequent bona fide purchaser, such as the position occupied by the trustee in this case, constructive notice of the mortgage. It is precisely the failure of MLN to record this judgment prior to the filing of the debtor's bankruptcy case which allows the trustee to stand in the hypothetical shoes of a bona fide purchaser without notice of the MLN mortgage.

The determinative impact of this mistake of fact is clear from Paragraph 8 of this Court's Entry Order.

> ¶ 8. In this case, a reasonable investigation, such as a title search, would have revealed not only that MLN claimed an equitable mortgage on the property (via the foreclosure complaint), but also that the superior court had confirmed the validity of MLN's claim (via the foreclosure decree). Hence, any person acquiring an interest in the property subsequent to these recordings cannot be considered a bona fide purchaser without notice.

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Docket No. 2002-564, Entry Order, dated October 18, p. 3, ¶ 8. Because the judgment order was ***never*** recorded in the land records, it would ***not*** have been revealed by a title search and the claim of a subsequent bona fide purchaser would not have been subject to it.

It is clear from this Court's Entry Order that a crucial premise of this Court's reformulation of the certified question, as well as its ultimate conclusion, was the mistaken assumption that MLN's foreclosure judgment was *recorded* in the land records and would be revealed by a title search of the subject property. Appellees respectfully point out that such was not a fact established in the record of this case, is at odds with the factual record of the appeals below and is simply not correct, as shown by the Affidavit filed with this motion.

CONCLUSION

For all of the above reasons, Appellees respectfully request that this Court grant reargument pursuant to V.R.C.P. 40, reconsider its Entry Order dated October 18, 2004 and schedule this matter for oral argument.

Dated: October 27, 2004.

Respectfully Submitted,

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